

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 ISAAC LEWIS,

9 Petitioner

10 v.

11 JOHNSON, et al,

12 Respondents.

Case No.: 2:21-cv-00580-RFB-NJK

**Order Granting Motion for Appointment
of Counsel, Granting Motion to Reopen
Case, and Setting Briefing Schedule**

(ECF Nos. 6,7)

13 Isaac Lewis asks the court to grant his motion pursuant to Rule 60(b) of the Federal Rules
14 of Civil Procedure to reopen his 28 U.S.C. § 2254 habeas action. ECF No. 6. Respondents
15 oppose the motion, and Lewis replied. ECF Nos. 14, 19. As discussed below, the motion is
16 granted. The Court also grants his motion for counsel, directs that he file an application to
17 proceed in forma pauperis or pay the filing fee, and sets a briefing schedule.

18 **I. Motion for Appointment of Counsel**

19 As a preliminary matter, the Federal Public Defender (“FPD”) has asked the court to be
20 appointed as counsel for Lewis. (ECF No. 7. There is no constitutional right to appointed counsel
21 in a federal habeas corpus proceeding. Luna v. Kernan, 784 F.3d 640, 642 (9th Cir. 2015)
22 (citing Lawrence v. Florida, 549 U.S. 327, 336–37 (2007)). An indigent petitioner may request
23 appointed counsel to pursue habeas relief. 18 U.S.C. § 3006A(a)(2)(B). The decision to appoint

counsel is generally discretionary. Id. § 3006A(a)(2) (authorizing appointment of counsel “when the interests of justice so require”). As explained below, the FPD was appointed counsel in a subsequent federal habeas action Lewis filed in 2022. The FPD informs the Court that respondents may have a timeliness defense in the 2022 action, and the FPD views this 2021 case as the better vehicle for litigating Lewis’s claims. The court grants the motion for appointment of counsel.

II. Rule 60(b)(6) Motion to Reopen the Case

a. Background

In April 2021, this Court dismissed Lewis’s pro se 28 U.S.C. § 2254 petition for writ of habeas corpus without prejudice as improperly commenced. ECF No. 3; 28 U.S.C. § 1915(a)(2) and Local Rule LSR1-2. Lewis had submitted a petition but had failed to submit an application to proceed in forma pauperis or pay the filing fee. The court expressly dismissed the action without prejudice to Lewis filing a new federal habeas petition, in a new case with a new number and a new, completed application to proceed in forma pauperis with the required financial information or the \$5.00 filing fee. ECF No. 3. Pursuant to the order, the Clerk of Court sent Lewis a copy of this Court’s form 28 U.S.C. § 2254 petition, an application to proceed in forma pauperis with instructions, and a copy of the petition he submitted. ECF Nos. 3-1, 3-2, 3-3. The case was closed, and judgment was entered. See ECF No. 5.

Lewis’s timely state postconviction proceedings had concluded on February 16, 2021. Thus, when this court dismissed the federal petition without prejudice on April 27, 2021, Lewis had almost 10 months remaining of the one-year federal statute of limitations under the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Instead of filing a new federal

1 habeas petition, Lewis returned to state court and filed a second state postconviction petition on
2 May 24, 2021. ECF No. 13-1, Exh. 1.

3 Lewis took no further action in this court until he dispatched a second federal habeas
4 petition for mailing on May 15, 2022. See Case no. 2:22-cv-00802-ART-NJK. In that case the
5 court granted his motion for counsel and appointed the FPD. See id. at ECF No. 3. The FPD
6 entered a notice of appearance in July 2022, and filed a motion to stay the case in October 2022.
7 Id. at ECF Nos. 5, 7. The FPD explained that it contemporaneously filed a motion to reopen this
8 2021 case under FRCP 60(b)(6) because in counsel's view the 2021 petition was the appropriate
9 vehicle to litigate Lewis's substantive claims for relief. Respondents filed a non-opposition to the
10 motion to stay the 2022 case. 2:22-cv-00802 at ECF No. 8. The court granted the motion to stay
11 the 2022 case pending the outcome of this Rule 60(b) motion. Id. at ECF No. 9.

12 **b. Legal Standard under FRCP Rule 60(b) & Analysis**

13 Rule 60(b) entitles the moving party to relief from judgment on several grounds,
14 including the catch-all category "any other reason justifying relief from the operation of the
15 judgment." FRCP 60(b)(6). A motion under subsections (b)(4)-(6) must be brought "within a
16 reasonable time." FRCP 60(c)(1). To seek relief under Rule 60(b)(6), a moving party must show
17 "extraordinary circumstances justifying the reopening of a final judgment." Jones v. Ryan, 733
18 F.3d 825, 833 (9th Cir. 2013), quoting Gonzalez v. Crosby, 545 U.S. 524, 535 (2005). Such
19 circumstances "rarely occur in the habeas context." Id.

20 Lewis argues that this Court improperly dismissed his petition without first giving him an
21 opportunity to pay the filing fee or submit an application to proceed in forma pauperis. ECF No.
22 6 at 13. He argues that courts must generally give habeas petitioners notice and an opportunity to
23 be heard before sua sponte dismissing a petition for procedural reasons. Id., citing Day v.

1 McDonough, 547 U.S. 198, 210 (2006); Boyd v. Thompson, 147 F.3d 1124, 1128 (9th Cir. 1998).
2 He also points out that pro se filings are generally held to a less stringent standard. See, e.g.,
3 Erickson v. Pardus, 551 U.S. 89, 94 (2007).

4 Respondents oppose the motion, arguing that Lewis has demonstrated neither
5 extraordinary circumstances nor that he brought his motion within a reasonable time. ECF No.
6 14. First, they contend that dismissing the petition without prejudice as improperly commenced
7 is not extraordinary. They point to this Court’s inherent authority to control its docket. See
8 Thompson v. Housing Authority of City of Los Angeles, 782 F.2d 829, 831 (9th Cir. 1986).
9 Second, they argue that Lewis did not file his motion to reopen this case within a reasonable time
10 when he filed it 18 months after the court dismissed his petition without prejudice. They assert
11 that Lewis cannot show he was diligently pursuing his rights by returning to state court and filing
12 a procedurally barred second state habeas petition.

13 Lewis’s reliance on Day and Boyd is misplaced. Those cases explained that when raising
14 sua sponte a limitations or procedural default defense district courts must give the parties notice
15 and an opportunity to respond before dismissal. Day, 547 U.S. at 210; Boyd, 147 F.3d at 1128.
16 But here the Court simply dismissed the petition without prejudice as improperly commenced. It
17 appears that ample time remained to timely file a new action, and the Court explicitly informed
18 petitioner how to correctly file a new petition.

19 This Court did not err, and in fact acted well within its authority to manage its docket in
20 dismissing the action as improperly commenced. However, “Rule 60(b)(6) is a grand reservoir of
21 equitable power, and it affords courts the discretion and power to vacate judgments whenever
22 such action is appropriate to accomplish justice.” Phelps v. Alameida, 569 F.3d 1120, 1135 (9th
23

1 Cir. 2009). The court concludes that on the narrow, specific facts and circumstances presented by
2 this case, justice is best served by granting Lewis's 60(b) motion.

3 A Las Vegas jury convicted Lewis of several counts of armed robbery and attempted
4 murder in connection with four different robberies in 2015. See ECF No. 6. Lewis was 23 years
5 old at the time of the offenses. The state district court adjudicated him a habitual criminal and
6 sentenced him to life in prison without the possibility of parole, along with additional
7 consecutive sentences. He timely pursued state postconviction litigation; the Nevada Supreme
8 Court affirmed his convictions, and the Nevada Court of Appeals affirmed the denial of his state
9 postconviction habeas corpus petition. He timely filed this federal petition. See ECF No. 4 at 1.
10 He alleges numerous claims of ineffective assistance of trial counsel, including failure to
11 adequately investigate and prepare for trial, to pursue his alibi, and to object to prosecutorial
12 misconduct. Lewis also asserts that the state district court denied continuances sought by the
13 defense even though defense counsel informed the court that he was unprepared for trial. A
14 denial of the motion to reopen might preclude federal review of the merits of his claims.¹ The
15 Federal Rules of Civil Procedure reflect a "strong policy . . . favoring decisions on the merits."
16 Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986). The court will therefore grant the motion
17 to reopen Lewis's case.

18 **III. Conclusion**

19 **IT IS THEREFORE ORDERED** that petitioner's motion to reopen case (ECF No. 6) is
20 **GRANTED** as set forth in this order.

21 **IT IS FURTHER ORDERED** that the Clerk of Court **REOPEN** the file in this case.

22
23

¹ Of course granting the motion to reopen does not guarantee that the court will reach the merits of Lewis' claims.

1 **IT IS FURTHER ORDERED** that petitioner's motion for appointment of counsel (ECF
2 No. 7) is **GRANTED**.

3 **IT IS FURTHER ORDERED** that within **30 days** of the date of this order petitioner
4 submit a fully completed application to proceed in forma pauperis or pay the \$5.00 filing fee.

5 **IT IS FURTHER ORDERED** that petitioner has **90 days** from the date of this order to
6 file and serve on respondents an amended petition for writ of habeas corpus, if any.

7 **IT IS FURTHER ORDERED** that respondents have **45 days** after service of an
8 amended petition within which to answer, or otherwise respond to, the amended petition. If
9 petitioner does not file an amended petition, respondents have 45 days from the date on which
10 the amended petition is due within which to answer, or otherwise respond to, petitioner's original
11 petition. Any response filed should comply with the remaining provisions below, which are
12 entered pursuant to Habeas Rule 5.

13 **IT IS FURTHER ORDERED** that any procedural defenses raised by respondents in this
14 case be raised together in a single consolidated motion to dismiss. In other words, the court does
15 not wish to address any procedural defenses raised herein either in seriatum fashion in multiple
16 successive motions to dismiss or embedded in the answer. Procedural defenses omitted from
17 such motion to dismiss will be subject to potential waiver. Respondents should not file a
18 response in this case that consolidates their procedural defenses, if any, with their response on
19 the merits, except pursuant to 28 U.S.C. § 2254(b)(2) as to any unexhausted claims clearly
20 lacking merit. If respondents do seek dismissal of unexhausted claims under § 2254(b)(2): (a)
21 they should do so within the single motion to dismiss not in the answer; and (b) they should
22 specifically direct their argument to the standard for dismissal under § 2254(b)(2) set forth in
23 Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005). In short, no procedural defenses,

1 including exhaustion, should be included with the merits in an answer. All procedural defenses,
2 including exhaustion, instead must be raised by motion to dismiss.

3 **IT IS FURTHER ORDERED** that, in any answer filed on the merits, respondents must
4 specifically cite to and address the applicable state court written decision and state court record
5 materials, if any, regarding each claim within the response as to that claim.

6 **IT IS FURTHER ORDERED** that petitioner has **30 days** after service of the answer or
7 responsive pleading to file and serve his response.

8 **IT IS FURTHER ORDERED** that any additional state court record exhibits filed herein
9 by either petitioner or respondents be filed with a separate index of exhibits identifying the
10 exhibits by number. The CM/ECF attachments that are filed also must be identified by the
11 number of the exhibit in the attachment. Each exhibit must be filed as a separate attachment.

12 **IT IS FURTHER ORDERED** that, at this time, the parties send courtesy copies of **any**
13 **responsive pleading and all INDICES OF EXHIBITS ONLY** to the Reno Division of this
14 court. Courtesy copies are to be mailed to the Clerk of Court, 400 S. Virginia St., Reno, NV,
15 89501, and directed to the attention of "Staff Attorney" on the outside of the mailing address
16 label. **No further courtesy copies are required unless and until requested by the court.**

17
18 DATED: 30 September 2023.



19
20 **RICHARD F. BOULWARE, II**
21 **UNITED STATES DISTRICT JUDGE**
22
23